VANDELAY VENTURES SDN BHD & ANOR v. KETUA PENGARAH, LEMBAGA MINYAK SAWIT MALAYSIA & ANOR

HIGH COURT MALAYA, SHAH ALAM
TUN ABD MAJID HAMZAH J
[JUDICIAL REVIEW NO: BA-25-60-08-2020]
8 MARCH 2020

ADMINISTRATIVE LAW: *Judicial review – Application for – Application for judicial review against decision of Director General ('DG') of Malaysian Palm Oil Board – Officials conducted raid and seized oil – Company sought return of seized oil and application rejected by DG – Whether matter under investigation – Whether DG could return seized oil – Whether court had power to order return/release of seized oil – Whether matter amenable to judicial review*

The applicants were companies engaged in the selling, buying, forwarding and exporting of used cooking oil. The applicants had separately entered into several contracts with Kazhou Pte Ltd ('KPL') to sell and forward used cooking oil ('seized oil'). Pursuant to the said contracts, the applicants had forwarded the seized oil to a storage facility in Butterworth, Pulau Pinang, prior to exportation. The respondents' officials had conducted a raid and seized the said oil. As no action was taken, the applicants each wrote to the first respondent, seeking for the return of the seized oil. The first respondent, by way of a letter, rejected the applications on the basis that the matter was under investigation ('letter') ('first respondent's decision'). Hence, the present judicial review against the first respondent's decision on the grounds that: (i) the first respondent's decision was unreasonable as it failed to consider that the applicants had the title in the seized oil and their right had been infringed; (ii) there was an inordinate delay in the investigation which had caused the seized oil to deteriorate in quality and value; (iii) the respondents had not acted in good faith and without reasonable belief in making the decision and had violated the principle of natural justice; and (iv) the refusal to return the seized oil was not in accordance with recognised principles.

Held (dismissing application with costs):

(1) The question of propriety right, raised by the applicants, was not relevant at this stage as the matter was pending before the Magistrate's Court in Butterworth. It was for the Magistrate to decide in accordance with s. 56 of the Malaysian Palm Oil Board Act 1998. The first respondent's decision was not amenable to judicial review (paras 17 & 21)

(2) The prosecution was instituted after the first respondent's decision was made, which meant that the matter was under investigation, as stated in the letter. The first respondent was no longer seized with the power to return or release the seized oil once prosecution was instituted. Such action, *ie*, the return or release of the seized oil, may stifle any impending prosecution. (paras 18 & 20)

(3) The court did not have the power, at this stage, to return the seized oil even if the decision of the first respondent was tainted with illegality, irrationality or procedural impropriety. It was not the business of a civil court to meddle into the affairs of a criminal court. The propriety right could be asserted in a civil suit against KPL. It was not for the court to decide on that issue in the present application. (para 18)

Case(s) referred to:

Abdul Aziz Lebai Milin & Ors v. Suruhanjaya Pengangkutan Awam Darat [2016] MLRHU 1613 ***(refd)***

Ahmad Azam Mohamad Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors [2004] 1 LNS 2009 HC ***(refd)***

City Growth Sdn Bhd & Anor v. The Government Of Malaysia [2005] 7 CLJ 422 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. Mohamad Hanafiah Hj Zakaria & Ors [2012] 7 CLJ 609 HC ***(refd)***

Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2018] Supp MLJ 16 ***(refd)***

Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop Of Kuala Lumpur [2013] 8 CLJ 890 CA ***(refd)***

Mitsui & Co Ltd And Anor v. Flota Mercnate Grancolombiana [1989] 1 All ER 951 ***(refd)***

Pendaftar Hakmilik, Pejabat Tanah Dan Galian Negeri Selangor v. Bank Pertanian Malaysia Bhd [2016] 3 CLJ 851 CA ***(refd)***

R v. Sloan [1990] 1 NZLR 474 ***(refd)***

Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor [2017] 10 CLJ 1 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 13(1)

Malaysian Palm Oil Board Act 1998, ss. 20, 53, 56(1), (3), 57, 58, 74

Malaysian Palm Oil Board (Licensing) Regulations 2005, reg. 5(1)(i)

For the appellant - Nur Afiqah Mohd Ashriee & Aizul Rohan Anuar; M/s Saiful, Roger & Co

For the respondent - Noor Hisham Ismail & Najib Zakaria; M/s Najib Hisham Isa

Reported by Najib Tamby

JUDGMENT

Tun Abd Majid Hamzah J:

Introduction

[1] Both the applicants are private local companies engaging in selling, buying, forwarding and exporting used cooking oil. They seek for a judicial review over the first respondent's decision made on 4 August 2020 refusing to return the seized used cooking oil.

Facts

[2] The first and the second applicants had separately entered into several contracts with one Kazhou Pte Ltd ("KPL") incorporated in Singapore to sell and forward 6,000 mt and 4,200mt of used cooking oil ("seized oil") respectively and KPL in turn appointed one Kyrox Sdn Bhd ("KSB") to export the seized oil to one company Oberosterreichische Biodiesel-Bulgaria Ltd being the purchaser. Pursuant to the said contracts the first applicant had forwarded 5,000 mt while the second applicant had forwarded 4,200 mt of the seized oil in stages to a storage facility in Butterworth prior exportation.

[3] On 26 May 2020 at about 0100hrs the respondents' officials conducted a raid and seized the said oil. As there was no further action being taken up, the solicitors acting for both the applicants separately wrote to the first respondent on 22 July 2020 and 23 July 2020 seeking for the return of the seized oil. Both the applicants claimed title in the seized oil as KPL had not paid them in full. The first respondent *vide* a letter dated 4 August 2020 rejected both applications citing the matter was under investigation.

[4] The fact that the seized oil is categorised as Sludge Palm Oil/SPO under the Malaysian Palm Oil Board (Licensing) Regulations 2005 ("the Regulations") was not in dispute.

Enclosure 12

[5] In this application the applicants seek for:

> 5.1 Perintah *Certiorari* membatalkan dan/atau mengenepikan keputusan Responden Pertama bertarikh 4/8/2020 terhadap Pemohon Pertama dan/atau Pemohon Kedua;
>
> 5.2 Satu deklarasi bahawa keputusan Responden Pertama menolak permohonan Pemohon-Pemohon melalui suratnya bertarikh 04/08/2020, adalah tidak dilakukan secara suci hati ("good faith") dan dengan kepercayaan wajar ("reasonable belief"), dan tidak menurut undang-undang serta tanggungjawab statutori Responden Pertama dan/atau tidak munasabah, adalah tidak sah dan terbatal di sisi undang-undang;

A 5.3 Perintah bahawa keseluruhan kesan dan/atau tindakan lanjutan terhadap keputusan melalui surat-surat bertarikh 4/8/2020 kepada Pemohon Pertama dan/atau Pemohon Kedua adalah digantung sehingga pelupusan sepenuhnya permohonan Semakan Kehakiman ini;

5.4 Perintah *mandamus* terhadap Responden Pertama untuk memulangkan
B dan/atau melepaskan Minyak Masak Terpakai yang telah disita kepada Pemohon Pertama ialah sebanyak 5,000.00 metrik tan dalam tempoh tiga (3) hari dari tarikh Perintah ini diberikan;

5.5 Perintah *mandamus* terhadap Responden Pertama untuk memulangkan dan/atau melepaskan Minyak Masak Terpakai yang telah disita kepada
C Pemohon Kedua iaitu sebanyak 4,200.00 metrik tan dalam tempoh tiga (3) hari dari tarikh Perintah ini diberikan;

5.6 Gantirugi kerosakan Minyak Masak Terpakai yang telah disita kepada Pemohon-Pemohon;

5.7 Kos untuk permohonan ini dijadikan kos dalam kausa;

D 5.8 Gantirugi am untuk ditaksirkan oleh Mahkamah yang Mulia ini;

5.9 Perintah-Perintah dan/atau arahan-arahan selanjutnya yang mungkin diberikan atau dibuat yang Mahkamah Yang Mulia ini yang wajar dan suaimanfaat.

E **[6]** The application is premised upon that:

(i) the impugned decision was unreasonable as the respondents failed to consider that:

(a) applicants remain having title in the seized oil and licensed under the Regulations;

F

(b) the applicants' right as having title in the said seized oil has been infringed under the law of contract and art. 13(1) of the Federal Constitution;

(c) the chemist report confirming that the seized oil is the product of oil
G palm had been obtained very much earlier;

(d) there was inordinate delay in the investigation which has cause the seized oil to deteriorate in quality and value; and

(e) the letter dated 4 August 2020 gave no indication of any offence being committed by the applicants.

H

(ii) the respondents had not acted in good faith and without reasonable belief in making the impugned decision and have violated the principle of natural justice; and

I (iii) the refusal to return the seized oil was not in accordance with recognised principles.

[7] The respondents in opposing this application averred that KSB was not a licensed exporter for sludge palm oil and has been arraigned on a charge of attempting to export palm oil without licence under reg. 5(1)(i) of the Regulations on 1 September 2020 and that pending prosecution the seized oil could not be released or returned.

Submissions

By The Applicants

[8] Learned counsel for the applicants submitted that since KPL had not fully paid for the seized oil, the same had not been passed to KPL. In support, she cited the case of *Mitsui & Co Ltd And Anor v. Flota Mercnate Grancolombiana* [1989] 1 All ER 951. Further, the applicants have not been charged with any offence in respect of the seized oil. It was argued that the respondents took a long time to investigate notwithstanding that the chemist report was ready about a month after the seizure. However, only on 27 July 2020 KSB and one Chew Gek Suan were charged with attempting to export the seized oil without licence. It was submitted that such offence did not entail lengthy investigation.

[9] Learned counsel pointed out that the respondents in refusing to return or release the seized oil also relied on s. 53 of the Malaysian Palm Oil Board Act 1998 ("the Act") when they had not shown whether the conditions stated therein had been satisfied and that the real intention was to deprive the applicants of the seized oil.

[10] In addition, learned counsel argued that the respondents failed to comply with s. 57 of the Act which mandates them to refer the seized oil to the Magistrate once there was a claim for the same and that the applicants are licensed to deal with the seized oil, which fact was never in dispute. They are the aggrieved party affected by the impugned decision.

[11] It was further submitted that the first respondent had acted beyond his jurisdiction, which is provided under s. 20 of the Act, in determining which party has the title over the seized oil and that the decision was made in bad faith and would not be protected under s. 74 of the Act. References were made to *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop Of Kuala Lumpur* [2013] 8 CLJ 890; [2013] 6 MLRA 8; *Pendaftar Hakmilik, Pejabat Tanah Dan Galian Negeri Selangor v. Bank Pertanian Malaysia Bhd* [2016] 3 CLJ 851; [2016] 3 MLRA 296; and *Abdul Aziz Lebai Milin & Ors v. Suruhanjaya Pengangkutan Awam Darat* [2016] MLRHU 1613.

[12] The impugned decision was an administrative decision and has nothing to do with the criminal prosecution initiated against KSB and Chew Gek Suan, hence, amenable to judicial review.

By The Respondents

[13] Learned counsel for the respondents submitted that the application was misconceived in law. It was submitted by learned counsel for the respondents that the officers of the second respondents were carrying out their investigative function under the Act and therefore their actions were not reviewable. He referred to *R v. Sloan* [1990] 1 NZLR 474; *Ahmad Azam Mohamad Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 1 LNS 2009; [2004] 4 MLJ 86; and *City Growth Sdn Bhd & Anor v. The Government Of Malaysia* [2005] 7 CLJ 422; [2006] 1 MLJ 581.

[14] It was further submitted that s. 57 of the Act has no application because prosecution has been instituted against KSB and the seized oil would be tendered as exhibit therefore it was not possible to return or release the same to the applicants. He contended that a claim under the said provision can only be made by the owner if there was no prosecution as provided for under sub-s. 56(3) of the Act. Learned counsel further referred to s. 58 of the Act which provides that the first respondent has the discretion even to return or release the seized oil to the person who had custody of the same when it was confiscated.

[15] It was further submitted that the impugned decision was not amenable to judicial review as once prosecution has been instituted by virtue of sub-s. 56(1) of the Act, the fate of the seized oil would be decided by the Magistrate. Therefore, the first respondent cannot return the seized oil. He referred to *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123. He argued further that the civil court should not interfere with the process of criminal proceeding. The following cases were cited namely, *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12 and *Dato' Seri Anwar Ibrahim v. Mohamad Hanafiah Hj Zakaria & Ors* [2012] 7 CLJ 609.

Decision

[16] In *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor* [2017] 10 CLJ 1; [2017] 5 MLJ 349, the respondents applied to quash the notices issued ordering them to appear at the respondent's office for their statements to be recorded. The Federal Court in allowing the appeal at p. 16 (CLJ); p. 366 (MLJ) had this to say:

> [42] The general conclusion that can be drawn from the cases referred to above is that the actions or decisions of a public authority in exercise of its powers in the course of criminal investigation or enquiry is not open to judicial review. Therefore, the answer to the question posed to this court is that the exercise of legitimate power, namely, the issuance of the notice pursuant to s. 30(1)(a) of the Act by the first appellant through the

third appellant is not amenable to judicial review. The notice was issued in order to assist the appellants in the investigation of a corruption offence under s. 16(b) of the Act. To hold otherwise, would expose the criminal investigative processes of all law enforcement agencies to constant judicial review. On the facts of this case, the respondents failed to establish that the notice was issued *mala fide* or in bad faith.

Clearly from the above-quoted passage, the applicants have to show whether the impugned decision was *mala fide* and the discretion was illegitimately exercised.

[17] The complaints were that the propriety right over the seized oil remained with them since KPL had not paid the purchase price in full. The contracts entered were terminated by the applicants on 21 August 2020 (see encl. 9). The question of propriety right, to my mind, is not relevant at this stage particularly so when the matter is pending before the Magistrate's Court in Butterworth. It is for the presiding Magistrate to decide at the end of the day in accordance with s. 56 of the Act which reads:

56. (1) If prosecution is instituted with regard to any oil palm product or the proceeds of sale thereof, or any conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Act, the court before which the prosecution with regard thereto has been held may order the forfeiture or release of the thing concerned.

(2) The court shall order the forfeiture of the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article if it is proved to the satisfaction of the court that an offence under this Act has been committed and that the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article was the subject matter of or was used in the commission of the offence, notwithstanding that no person may have been convicted of such offence.

(3) If no prosecution is to be instituted with regard to any oil palm product or the proceeds of sale thereof, or any conveyance, machinery, contrivance, equipment, book, record, document or other article seized under this Act, the authorized officer in whose custody it is held shall notify the person from whom the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article was seized of that fact and of the provisions of section 57.

(4) A notice under subsection (3) shall be in writing and shall be sent to the last known address of the person concerned.

(5) If no claim is made under section 57 within thirty days from the date of service of the notice referred to in subsection (3), the oil palm product or the proceeds of sale thereof, or the conveyance, machinery, contrivance, equipment, book, record, document or other article seized shall be taken and deemed to be forfeited at the expiration of that period.

[18] The first respondent is no longer seized with the power to return or release the seized oil once a prosecution is instituted. It is for the same reason that I think I too have no the power to return it at this stage even if the decision of the first respondent was tainted with illegality, irrationality or procedural impropriety. It is not the business of a civil court to meddle into the affairs of a criminal court. Even if the evidence is illegally obtained, it is admissible. The so-called propriety right can be asserted in a civil suit against KPL. And it is not for me to decide on that issue in this application.

[19] Section 57 of the Act will apply when there is no prosecution and sub-s. 56(3) deals with seizure which does not culminate in a prosecution. Clearly s. 57 has no application to this case.

[20] The prosecution was instituted after the decision was made, meaning that the matter was under investigation at the material time. As stated in the letter dated 4 August 2020. Hence, no way could the seized oil be returned or released as such action may stifle any impending prosecution. In *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor* [2018] Supp MLJ 16, the respondents' officers raided the appellant's new factory where two machines were seized. There was no approval given by the Ministry for the appellant to operate them. The appellant filed a judicial review, *inter alia*, to quash the decision of the second respondent for refusing to release the machines. Ahmad Maarop FCJ (as he then was) at p. 29 said:

> [24] Thus it is clear to us that the seizure challenged by the appellant in its judicial review application was an act done by the respondents' officers in the exercise of a function in relation to a criminal investigation for an offence under Act 606. In our view such an exercise of power in the course of a criminal investigation is not open to review under O. 53 of the RHC. To hold otherwise would, to our mind, be exposing the criminal investigative process of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of parliament. A balance has to be struck between the right of disgruntled persons such as the appellant, to seek redress in the form of damages for the alleged wrongful seizure of its property and the duty of the investigative agency through its officers to bring wrongdoers to face justice by arresting them and collecting, in the course of investigation, whatever evidence against them. In this connection the need to conduct prompt and unimpeded criminal investigation is well recognised by the court (see *Ooi Ah Phua v. Officer-in-charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, *Hashim bin Saud v. Yahaya bin Hashim & Anor* [1977] 2 MLJ 116, *Datuk Seri Ahmad Said Hamdan, Ketua Suruhanjaya, Suruhanjaya Pencegah Rasuah Malaysia & Ors v. Tan Boon Wah* [2010] 3 MLJ 193). If decisions made and actions taken in the process of criminal investigation pursuant to the power given by law, such as the impugned seizure in this case are amenable to judicial review, then criminal investigative machinery may not function smoothly and efficiently as it should be.

Thus, based on this authority I do not see how the applicants can persuade me to accede to their application.

[21] It is my view further that it is within the authority of the first respondent to dispose the seized oil pursuant to s. 53 of the Act, but, of course it is not at his whims and fancies. There are pre-conditions to be satisfied before such power can be exercised. Still, the recourse is to sue for damages if the applicants can prove that the action of the first respondent is flawed. The decision dated 4 August 2020 was not amenable to judicial review.

[22] Based on the reasons discussed, I dismissed the application with costs.